

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PEGGY S. VALLES)	
Claimant)	
VS.)	
)	
NEW CHANCE, INC.)	Docket No. 1,052,400
Respondent)	
AND)	
)	
MIDWEST INSURANCE CO., INC.)	
Insurance Carrier)	

ORDER

Respondent appeals the June 2, 2011, preliminary hearing Order For Medical Treatment of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was awarded medical treatment, with the treatment by Dr. Shah, ordered paid for claimant's back and left knee.

Claimant appeared by her attorney, D. Shane Bangerter of Dodge City, Kansas. Respondent and its insurance carrier appeared by their attorney, James P. Wolf of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Vito J. Carabetta, M.D., taken April 25, 2011, with exhibits; the deposition of Peggy Valles taken May 19, 2011; the deposition of Brad Flax taken May 19, 2011; the transcript of Preliminary Hearing held June 1, 2011, with exhibits; and the documents filed of record in this matter.

ISSUE

Did the injuries to claimant's low back and left knee arise out of and in the course of her employment with respondent? Claimant contends that her low back and left knee complaints are the result of either an antalgic gait due to an injury to her right knee or are an aggravation of a preexisting condition to both the back and the knee. Respondent argues that claimant initially alleged that both the left knee and back complaints stemmed from an injury to her right knee on February 10, 2009, when claimant fell from a ladder

while preparing to paint. When that claim failed, claimant then filed the present claim alleging a series of traumatic injuries to both her left knee and low back from her employment with respondent. Respondent questions claimant's credibility. Respondent contends the ALJ, in awarding preliminary benefits herein, exceeded her authority and/or jurisdiction.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order For Medical Treatment should be affirmed with regard to the left knee, but reversed with regard to the low back.

Claimant had worked for respondent as a custodian, kitchen worker, maintenance worker and laborer since June 4, 2007. On February 10, 2009, claimant was standing on a ladder preparing to paint the ceiling when she fell. Claimant reported the accident to Brad Flax, respondent's financial director and human resources personnel person. However, Mr. Flax testified that claimant initially came to him with a complaint of a right knee injury on or about February 9, 2009.

Claimant initially sought treatment with her family doctor, Sean Conrad, M.D. This treatment involved the right knee only. The right knee was x-rayed, and claimant was referred for physical therapy, with no benefit. A February 16, 2009, MRI displayed underlying chondromalacia patella changes. Two cortisone injections were also of no help. Claimant was referred to Ian Kovach, M.D., an orthopedic surgery specialist, on June 9, 2009. Five Supartz injections were administered in the right knee, with no benefit.¹ Claimant was discharged by Dr. Kovach on November 11, 2009, with the treatment to this point limited to her right knee. Claimant was later referred to orthopedic surgeon Kenneth Jansson, M.D., on February 22, 2010. On March 12, 2010, claimant underwent a right knee arthroscopy for the chondromalacia patella. This was followed by 4 to 6 weeks of physical therapy. Shortly after, claimant was returned to work at her regular duties.

Claimant was referred by her attorney to Pedro A. Murati, M.D., for an examination on December 1, 2009. Dr. Murati diagnosed, for the first time, left knee and low back injuries which he apparently determined stemmed from the accident on February 10, 2009. While Dr. Murati's examination of that date is discussed in both briefs and in other medical reports in this record, the actual report is not included in this record.²

¹ Dr. Carabetta stated in his August 24, 2010, report that the injections did not seem to help. (Carabetta Depo., Ex. 2 at 2.)

² Claimant's attorney states in his brief (on page 2) that he does not object to the content of Dr. Murati's December 1, 2009, report. And also states in his brief that he is attaching that report to said brief. However, it was not attached. Respondent objects to the inclusion of Dr. Murati's report as part of this record.

Claimant was referred by the ALJ to board certified physical medicine and rehabilitation specialist Vito J. Carabetta, M.D., on August 24, 2010. Dr. Carabetta, in reviewing claimant's past medical treatment, noted the lack of left knee and low back complaints until the examination by Dr. Murati. During the examination, Dr. Carabetta found claimant's straight leg raise to be negative at 90 degrees bilaterally in the seated position, but positive at only 30 degrees on the left side in the formal supine position. These findings are inconsistent.

Additionally, claimant advised Dr. Carabetta that she experienced immediate pain in her knees bilaterally and in her low back on the date of the February 10, 2009, accident. This history was dissimilar to the history provided to Dr. Murati, that claimant's low back pain had started about one month before his December 1, 2009, evaluation of claimant. Dr. Carabetta expressed distress that claimant had failed to identify both the left knee and low back injuries, before the Dr. Murati examination, to any other healthcare provider, even her own family doctor. Dr. Carabetta was unwilling to find a relationship between the original accident on February 10, 2009, and claimant's left knee and low back complaints.

On September 3, 2010, claimant filed a Form K-WC E-1 Application For Hearing (E-1) with the Kansas Division of Workers Compensation, claiming a new series of injuries to her back and left knee from November 2009 and every day thereafter. That claim was assigned Docket No. 1,052,400 and is the basis for this claim and this appeal. Dr. Carabetta was provided a joint letter from both claimant's and respondent's attorneys dated January 14, 2011. This letter was provided as the result of a preliminary hearing order from the ALJ after a December 8, 2010, hearing. No transcript or written order from that hearing is in the Board's file. In his response letter of March 11, 2011, Dr. Carabetta again noted that claimant's subjective low back and left knee complaints were not related to the February 10, 2009, accident. He was also asked whether claimant's low back and left knee complaints were aggravated by her return to work for respondent. He initially determined that it is conceivable that her routine work may have caused an aggravation of unknown underlying conditions. However, he opined that further evaluation would appear to be indicated. During his deposition on April 25, 2011, Dr. Carabetta was informed of additional information regarding claimant's previous low back injury in 2003, as well as being informed of a 1989 back injury. After being provided with this information, he determined that he could find nothing in the records to support claimant's contention that her previously injured low back was aggravated by her work. He had no good opinion regarding any aggravation of the left knee from claimant's work activities.

Dr. Carabetta's medical opinion is the only one in this record, with the exception of the December 7, 2004, report of Dr. Murati discussing claimant's low back injury on March 6, 2003. At that time, Dr. Murati found claimant had degenerative changes at L3-4 as the result of a work-related injury while claimant worked for Emporia State University as a custodian. Claimant also had right SI joint dysfunction along with the low back pain and degenerative disc disease. Claimant was rated at that time by Dr. Murati as having a

10 percent whole person functional impairment from that low back injury, pursuant to the fourth edition of the *AMA Guides*.³

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁷

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁸

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

⁴ K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 2009 Supp. 44-501(a).

⁷ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁸ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

Claimant suffered a compensable injury to her right knee on February 10, 2009, for which she was provided treatment, including surgery. Claimant has, since that time, alleged injuries to her left knee and low back, either at the time of the initial accident, or just prior to her December 2009 evaluation by Dr. Murati, or after returning to work for respondent, depending on which of claimant's several histories is being read at any particular time. The only medical opinion in this record addressing causation for claimant's alleged left knee and low back injuries is that of Dr. Carabetta, the court appointed evaluating expert. He initially expressed concern regarding the lack of initial documentation for both the left knee and low back in contemporaneous medical records after claimant's initial injury. He later opined that there could be a connection between claimant's return to work and her developed low back and left knee complaints. However, when advised of claimant's low back injury history, he was no longer willing to find that connection, at least as to the low back. He was noncommittal regarding the left knee.

This Board Member finds that claimant has not satisfied her burden of proving any connection between her work and her low back complaints. The testimony of claimant regarding the accident and injury scenario is too conflicting to overcome the medical opinion of Dr. Carabetta. The Order For Medical Treatment of the ALJ is reversed on that issue.

However, with regard to the left knee, Dr. Carabetta was unwilling to reverse his earlier opinion. He, instead, recommended further evaluation. As there is no indication in this record that claimant had preexisting problems with her left knee, the entitlement to medical treatment pursuant to the preliminary order remains.

A claimant's testimony alone is sufficient evidence of his own physical condition.⁹

This Board Member finds that claimant, by the barest of margins, has satisfied her burden with regard to the left knee. The Order For Medical Treatment of the ALJ involving medical treatment for the left knee is affirmed, for preliminary hearing purposes.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

¹⁰ K.S.A. 44-534a.

CONCLUSIONS

Claimant has failed to satisfy her burden of proving that her need for medical treatment for her low back is related to her job with respondent. The award of medical benefits for her low back is reversed. Claimant has satisfied that burden with regard to her left knee. The award of medical benefits for the left knee is affirmed, for preliminary hearing purposes.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Medical Treatment of Administrative Law Judge Pamela J. Fuller dated June 2, 2011, should be, and is hereby, reversed with regard to the award of medical treatment for her low back, but affirmed with regard to the award of medical treatment for her left knee.

IT IS SO ORDERED.

Dated this ____ day of August, 2011.

HONORABLE GARY M. KORTE

c: D. Shane Bangerter, Attorney for Claimant
James P. Wolf, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge